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## Recent Changes in Procedures of the Department of Environmental Quality

Kenneth M. Murchison\*

Experienced attorneys understand that administrative procedures often control the substance of environmental law. In Louisiana, the Secretary of the Department of Environmental Quality has broad discretion to set the content of environmental regulations and fees;<sup>1</sup> to issue, to deny, or to place conditions on permits;<sup>2</sup> and to select the appropriate method to enforce the Environmental Quality Act.<sup>3</sup> Lawyers who represent the regulated community as well as those who represent environmental groups recognize the importance of procedures for controlling the secretary's discretion.

The procedures used by the Department of Environmental Quality have long been controversial. When the department was created in 1983,<sup>4</sup> it continued to use the procedures established by its predecessor, the Environmental Control Commission.<sup>5</sup> On at least two occasions, the secretary proposed a new set of procedural rules; however, both proposals were withdrawn before rules were promulgated.<sup>6</sup> The secretary has replaced some aspects of the commission rules,<sup>7</sup> but the unrevoked portions remain in effect.

In 1994, the Louisiana Law Institute proposed a statutory codification of the procedures the Department of Environmental Quality uses with respect to permits, enforcement actions, and other declaratory rulings.<sup>8</sup> Although the

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1. See, e.g., La. R.S. 30:2011(D)(1), 2014(B), 2054(B)(1), (3), (5)-(8), 2074(B)(1)-(3), 2154(B), 2180(A), (D)(2)(b) (1989 and Supp. 1997). The Environmental Quality Act makes the department "the primary agency" responsible for environmental protection. La. R.S. 30:2011(A)(1) (Supp. 1997). This designation imposes constitutional obligations on the secretary to fulfill the requirements of La. Const. art. IX, § 1. See *Save Ourselves, Inc. v. Louisiana Envtl. Control Comm'n*, 452 So. 2d 1152 (La. 1984); Murchison, *Enforcing Environmental Standards Under State Law: The Louisiana Environmental Quality Act*, 57 La. L. Rev. 497, 497-98 (1997). Violations of rules issued by the secretary can be punished as felonies. *State v. All Pro Paint and Body Shop, Inc.*, 639 So. 2d 707 (La. 1994); Murchison, *supra* at 545-49.

2. See, e.g., La. R.S. 30:2011(D)(2), 2054(B)(2), 2074(B)(4), 2154(B)(2), 2180(A)(2) (1989 and Supp. 1997). The secretary can delegate this permitting power to an assistant secretary. See, e.g., La. R.S. 30:2011(D)(3), (G), 2014(A), 2022(C)(1), 2054(B)(2), 2074(B)(4), 2154(B)(2) (1989 and Supp. 1997).

3. See La. R.S. 30:2025 (1989 and Supp. 1997); see generally Murchison, *supra* note 1, at 500-03.

4. 1983 La. Acts No. 97, § 1.

5. See La. R.S. 30:2025 (1989 and Supp. 1997); see generally Murchison, *supra* note 1, at 501 n.34.

6. See 21 La. Reg. 554 (1994).

7. See La. Env. Reg. C. pt. I, §§ 301-73.

8. The author was a co-reporter of the committee that drafted the law institute proposal.

legislature did not enact any legislation based on the law institute proposal in 1994, it subsequently adopted a number of significant procedural reforms. In the 1995 regular session, the legislature adopted a variety of reforms. Perhaps most significantly, the legislature proposed a constitutional amendment (later adopted by the electorate) relating to administrative imposition of fees.<sup>9</sup> It also placed statutory restrictions on the ability of agencies to impose or to raise fees;<sup>10</sup> imposed new limits on rulemaking by the Department of Environmental Quality and other administrative agencies;<sup>11</sup> added a chapter on enforcement procedures and judicial review to the Environmental Quality Act;<sup>12</sup> and enacted other statutes relating to adjudications,<sup>13</sup> declaratory rulings,<sup>14</sup> and judicial review.<sup>15</sup> In the special session of 1996, the legislature revisited the issue of judicial review<sup>16</sup> and reversed a decision<sup>17</sup> that had invalidated the 1995 legislation.

This Article surveys and evaluates these recent changes. The first section summarizes the content of the changes, and the second explains their significance. The final portion of the article ruminates on what effect the changes are likely to have with respect to the protection of the state's environment.

## I. SUMMARY OF THE RECENT CHANGES

### A. Fees

In the 1995 regular session, the legislature made several changes regarding administrative imposition of fees. The most important was to propose a constitutional amendment prohibiting any new or increased fees without the approval of a supermajority of the legislature.<sup>18</sup> Other statutes limited administrative authority to impose fees by requiring the use of rulemaking procedures<sup>19</sup> and by limiting increases in fees to five percent per year.<sup>20</sup>

The voters approved the proposed constitutional amendment, which became section 2.1 of Article VII. The new section makes it nearly as difficult to impose

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9. La. Const. art. VII, § 2.1 (*proposed by* 1995 La. Acts No. 1324, § 1). *See infra* notes 18-24 and accompanying text.

10. La. R.S. 49:951(7), 971(A)(3) (Supp. 1997). *See infra* notes 25-29 and accompanying text.

11. La. R.S. 49:953(B)(4), (F), (G), 969 (1989 and Supp. 1997). *See infra* notes 30-57 and accompanying text.

12. 1995 La. Acts No. 947, § 1, adding La. R.S. 30:2050.1-.29 (Supp. 1997). *See infra* notes 89-120 and accompanying text.

13. 1995 La. Acts No. 739, § 1. *See infra* notes 58-85 and accompanying text.

14. La. R.S. 30:2050.10 (Supp. 1997). *See infra* notes 121-128 and accompanying text.

15. 1996 La. Acts No. 41, § 1; 1995 La. Acts No. 1208, § 1. *See infra* notes 129-138 and accompanying text.

16. 1996 La. Acts No. 41, § 1.

17. *In re Rubicon, Inc.*, 670 So. 2d 475 (La. App. 1st Cir. 1996).

18. 1995 La. Acts No. 1324, § 1.

19. 1995 La. Acts No. 1057, § 1, amending La. R.S. 49:951(7) (Supp. 1997).

20. 1995 La. Acts No. 1005, § 1, amending La. R.S. 49:971(A) (Supp. 1997).

fees as to levy taxes.<sup>21</sup> It applies to "[a]ny new fee or civil fine or [any] increase in an existing fee or civil fine imposed or assessed by the state or any . . . department,"<sup>22</sup> the only exception covers fees imposed by a "department which is constitutionally created and headed by an officer who is elected by majority vote of the electorate of the state."<sup>23</sup> The 1995 amendment mandates that any fee covered by its provisions must be enacted by "a law [passed] by a two-thirds vote of the elected members of each house of the legislature."<sup>24</sup>

The statutory changes regarding fees that were enacted in 1995 amended Louisiana's Administrative Procedure Act, not the Environmental Quality Act. Although the Administrative Procedure Act excludes agency decisions regarding fees from the statutory definition of a rule,<sup>25</sup> Act 1057 amended the Act to make "the procedures for adoption of rules and of emergency rules" applicable to the adoption of fees "[e]xcept where the context clearly provides otherwise."<sup>26</sup> In addition, another amendment to the Administrative Procedure Act generally prohibits agencies from changing the formula for computing any fee "in a manner that would increase the fee paid by any person by more than five percent of the relevant fee paid by such person in the previous fiscal year."<sup>27</sup>

Act 1057 also amended the Administrative Procedure Act to provide for a legislative committee to oversee any fee increase proposed by an agency. If a legislative oversight committee finds a proposed fee change "unacceptable," the agency may not change the fee.<sup>28</sup> Of course, the constitutional amendment described above<sup>29</sup> effectively moots this provision because it requires affirmative legislative action before a new or increased fee is imposed.

### B. Rulemaking

During the 1995 regular session, the legislature enacted several laws relating to agency rulemaking. The legislature required preparation of a risk-assessment analysis for all rules of the Department of Environmental Quality.<sup>30</sup> It also

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21. See La. Const. art. VII, § 2 (requiring a two-thirds vote of the legislature to levy any tax). It is still more difficult to levy taxes, however, because the legislature can consider taxes only in special sessions or in the regular legislative sessions held during even-numbered years. See La. Const. art. III, § 2(A)(2).

22. La. Const. art. VII, § 2.1(a) (1995).

23. *Id.* § 2.1(b). The departments that fall within the exception are State, Justice, Treasury, Agriculture, Insurance, and Elections and Registration. See *id.* art. III, §§ 7-12.

24. *Id.* art. VII, § 2.1(a).

25. La. R.S. 49:951(6) (Supp. 1997). The definition in the federal Administrative Procedure Act contains no comparable exclusion. See 5 U.S.C. § 551(4).

26. La. R.S. 49:951(7) (Supp. 1997).

27. La. R.S. 49:971(A)(3) (Supp. 1997), as amended by 1995 La. Acts No. 1005, § 1.

28. La. R.S. 49:971(A) (Supp. 1997), as amended by 1995 La. Acts No. 1057, § 1.

29. La. Const. art. VII, § 2.1. See *supra* notes 18-24 and accompanying text.

30. La. R.S. 49:953(G) (Supp. 1997), added by 1995 La. Acts No. 642, § 1. See *infra* notes 34-38 and accompanying text.

amended the procedures for issuing rules that are identical to federal rules;<sup>31</sup> imposed an additional requirement on agencies that issue emergency rules; and expanded the authority of the legislature<sup>32</sup> and legislative oversight committees<sup>33</sup> to override agency rulemaking decisions.

Although the duty to prepare a risk analysis is contained in an amendment to the Administrative Procedure Act, the new duty only applies to rules issued by the Department of Environmental Quality.<sup>34</sup> Moreover, the duty applies to all policies, standards, and regulations issued by the department except when the department's action is "required for compliance with a federal law or regulation;" is "identical to a federal law or regulation;" will "cost the state and affected persons less than one million dollars, in the aggregate, to implement;" or is issued as "an emergency rule."<sup>35</sup>

The Act appears to require the department to publish two risk-assessment documents for each rule that follows the normal rulemaking process. The department must publish a report of its risk assessment (or a summary of the report) in the *Louisiana Register* "prior to or concurrent with publishing notice of any proposed policy, standard, or regulation" and also "prior to promulgating any policy, standard, or final regulation."<sup>36</sup> No "regulation" covered by the amendment is "effective" until the secretary complies with the publication requirement.<sup>37</sup>

The statute also prescribes the content of the assessment report. The report must include four components: a "statement identifying the specific risks being addressed . . . and any published, peer-reviewed scientific literature used by the department to characterize the risks"; a "comparative analysis of the risks . . . relative to other risks of a similar or analogous nature to which the public is routinely exposed"; an "analysis based on published, readily available peer-reviewed scientific literature, describing how [the department's action] will advance the purpose of protecting human health or the environment against the

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31. La. R.S. 49:953(F) (Supp. 1997), added by 1995 La. Acts No. 512, § 1. See *infra* notes 39-50 and accompanying text.

32. La. R.S. 49:969 (Supp. 1997), as amended by 1995 La. Acts No. 1109, § 1. See *infra* notes 51-54, 56-57 and accompanying text.

33. La. R.S. 49:953(B)(4) (Supp. 1997), added by 1995 La. Acts No. 1057, § 1. See *infra* note 55 and accompanying text.

34. La. R.S. 49:953(G) (Supp. 1997), added by 1995 La. Acts No. 642, § 1.

35. La. R.S. 49:953(G)(3) (Supp. 1997). A departmental policy, standard, or regulation is "identical" to a federal law or regulation when "the proposed rule has the same content and meaning as the corresponding federal law or regulation." La. R.S. 49:953(G)(4) (Supp. 1997).

36. La. R.S. 49:953(G)(1) (Supp. 1997). The statute does not expressly authorize the department to use the same report for a final rule as it uses for a proposed rule, but that approach is probably permissible unless the responses to the proposed rule reveal major deficiencies in the original report. However, the statute does direct the department to "consider any scientific and economic studies or data timely provided by interested parties which are relevant" to the matters addressed in the report and to "the proposed policy, standard, or regulation being considered." La. R.S. 49:953(G)(5) (Supp. 1997).

37. La. R.S. 49:953(G)(2) (Supp. 1997).

specified identified risks"; and an "analysis and statement that . . . [the department's action] presents the most cost-effective method practically achievable to produce the benefits intended regarding the risks identified."<sup>38</sup>

Act 512 of the 1995 regular session is another amendment to the Administrative Procedure Act that applies only to the Department of Environmental Quality.<sup>39</sup> It prescribes an alternate procedure that the department "may use" when the secretary "proposes a rule that is identical to a federal law or regulation applicable in Louisiana."<sup>40</sup> However, the department may not use these procedures "for the adoption of any rules creating or increasing fees."<sup>41</sup>

The special procedure for rules identical to federal rules has eight steps the department must follow:

- (1) publication of a notice of the proposed rule in the *Louisiana Register* at least sixty days prior to taking action on the rule;<sup>42</sup>
- (2) submission of the notice of the proposed rule and the complete text to the *Louisiana Register* at least seventy days before the date the department proposes to adopt the rule;<sup>43</sup>
- (3) mailing of notice of the intent to adopt the rule "to all persons who have made timely request for such notice";<sup>44</sup>
- (4) establishment of a comment period "of not less than thirty days";<sup>45</sup>

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38. La. R.S. 49:953(G)(1)(a)-(d) (Supp. 1997).

39. La. R.S. 49:953(F)(3) (Supp. 1997).

40. *Id.* The amendment to subsection 953(F)(3) does not define the term identical, but the 1995 addition of subsection 953(G) does contain such a definition for purposes of that subsection. See *supra* note 35.

41. La. R.S. 49:953(F)(4) (Supp. 1997). This reference is somewhat confusing. The Administrative Procedure Act excludes fees from the definition of "rule," but it requires the agency to follow the procedures applicable to rules unless the context clearly indicates otherwise. See *supra* notes 25-26 and accompanying text.

42. La. R.S. 49:953(F)(3)(a) (Supp. 1997). The notice must include five elements:

(i) A statement of either the terms or substance of the intended action or a description of the subjects and issues involved.

(ii) A statement that no fiscal or economic impact will result from the proposed rule.

(iii) The name of the person within the department who has responsibility for responding to inquiries about the intended action.

(iv) The time, place, and manner in which interested persons may present their views thereon including the notice for a public hearing . . . .

(v) A statement that the intended action complies with the law administered by the department, including a citation of the specific provision, or provisions, of law which authorize the rule.

43. La. R.S. 49:953(F)(3)(b) (Supp. 1997). The office of the state register need not publish the complete rule if publication "would be unduly cumbersome, expensive, or otherwise inexpedient." In such a case, the office must include in the *Louisiana Register* "a notice stating the general subject matter of the omitted proposed rule, the process being employed by the department for adoption of the proposed rule, and [an explanation of] how a copy of the proposed rule may be obtained."

44. La. R.S. 49:953(F)(3)(c) (Supp. 1997).

45. La. R.S. 49:953(F)(3)(e) (Supp. 1997).

(5) availability "to all interested persons" of "copies of the proposed rule from the time the notice of its adoption is published in the Louisiana Register";<sup>46</sup>

(6) a written response from the department "describing the principal reasons for and against adoption of any amendments or changes suggested in the written comments and submissions and specifically addressing any assertion that the proposed rule is not identical to the federal law or regulation upon which it is based";<sup>47</sup>

(7) certification from the department, "under oath, . . . that the proposed rule is identical to a specified federal law or regulation applicable in Louisiana";<sup>48</sup> and

(8) adoption of the rule "no earlier than sixty days, nor later than twelve months, after the official notice of the proposed rule was published in the *Louisiana Register*."<sup>49</sup>

A rule adopted pursuant to the new procedures is not subject to legislative oversight unless oversight is "specifically requested, in writing," by the chair of a legislative oversight committee.<sup>50</sup>

A third statute passed by the 1995 legislature, Act 1057, amended the subsections of the Administrative Procedure Act regarding emergency rules and legislative oversight.<sup>51</sup> Unlike the provisions described above, the provisions of Act 1057 apply to all rules, not just those issued by the Department of Environmental Quality. The amendment requires the agency to prepare and to publish a statement identifying the "specific reasons" why an emergency rule is necessary<sup>52</sup> and provides for special legislative<sup>53</sup> and judicial<sup>54</sup> oversight of emergency rules. In addition, Act 1057 amended the provision providing for legislative review of agency rules to forbid an agency from proposing "a rule change or emergency rule that is the same or substantially similar" to a proposed rule that has been disapproved "within four months" after the disapproval, or

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46. La. R.S. 49:953(F)(3)(f) (Supp. 1997). This language appears imprecise. The legislature surely meant for the rules to be available from the time of their proposal, not their adoption.

47. La. R.S. 49:953(F)(3)(g) (Supp. 1997).

48. La. R.S. 49:953(F)(3)(h) (Supp. 1997). The certification must go to the governor, the attorney general, the speaker of the House of Representatives, the president of the Senate, the chair of the legislative oversight committees, and to the office of the state register. The department must also furnish the oversight committees with "its response to comments and submissions."

49. La. R.S. 49:953(F)(3)(j) (Supp. 1997). Subsection (j) also contains a proviso the meaning of which is not clear: "the *proposed* rule shall be effective upon its publication in the Louisiana Register, said publication to be subsequent to the act of adoption." *Id.* (emphasis added).

50. La. R.S. 49:953(F)(3)(l) (Supp. 1997).

51. 1995 La. Acts No. 1057, amending La. R.S. 49:953(B), 968(G) (Supp. 1997).

52. 1995 La. Acts No. 1057.

53. La. R.S. 49:953(B)(4) (Supp. 1997).

54. La. R.S. 49:953(B)(3) (Supp. 1997).

from proposing such a rule "more than once during the interim between regular sessions of the legislature."<sup>55</sup>

A fourth 1995 statute extended the legislature's authority to veto, to amend, or to suspend rules and fees adopted by a state agency. Like Act 1057, it applies to rules issued by all agencies. The new statute allows the legislature to alter agency rules and fees by adoption of "any Concurrent Resolution,"<sup>56</sup> which is not subject to veto by the governor.<sup>57</sup>

### C. Adjudications

Another amendment to the Administrative Procedure Act made major changes in the way that adjudications are conducted in the Department of Environmental Quality. Act 739 created a new division of administrative law, the Department of State Civil Service,<sup>58</sup> and granted the division responsibility for commencing and handling "all" adjudications after October 1, 1996.<sup>59</sup> Despite this inclusive language, the new law does contain some exemptions. In addition to specific exemptions applicable to particular administrative bodies,<sup>60</sup> the statute includes a general exemption for "[a]ny . . . agency which is required, pursuant to a federal mandate and as a condition of federal funding, to conduct or to render a final order in an adjudication proceeding . . . to the extent of the federal mandate."<sup>61</sup>

Act 739 provides for the appointment of administrative law judges to preside over adjudications. The new division in the Department of State Civil Service is, in turn, the employer of the administrative law judges. The head of the division is a director<sup>62</sup> whose responsibilities include hiring, assigning, and evaluating the administrative law judges.<sup>63</sup>

The most important change made by Act 739 is to give the administrative law judge the power to make the final administrative decision. In all cases involving an adjudication, the decision of the administrative law judge is "final." Neither the Department of Environmental Quality nor the secretary can reverse the decision or direct the administrative law judge to reconsider it.<sup>64</sup> Presum-

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55. La. R.S. 49:968(G) (Supp. 1997), *as amended by* 1995 La. Acts No. 1057, § 1.

56. La. R.S. 49:969 (Supp. 1997), *as amended by* 1995 La. Acts No. 1109, § 1. *But see* INS v. Chadha, 462 U.S. 919, 103 S. Ct. 2764 (1983) (holding federal legislative veto unconstitutional as violation of separation of powers established by the United States Constitution).

57. La. Const. art. III, § 17.

58. 1995 La. Acts No. 739, § 1, *adding* La. R.S. 49:991-99 (Supp. 1997).

59. La. R.S. 49:991 (Supp. 1997).

60. La. R.S. 49:992(D)(3)-(7) (Supp. 1997). The exemptions apply to "the office of worker's compensation administration," the "office of employment security," all "state professional and occupational licensing boards," the "Department of Agriculture," and the commissioner of conservation.

61. La. R.S. 49:992(D)(2) (Supp. 1997).

62. La. R.S. 49:996 (Supp. 1997).

63. La. R.S. 49:997 (Supp. 1997).

64. La. R.S. 49:992(B)(2) (Supp. 1997).



ably, however, the department is an "aggrieved person" entitled to seek judicial review of the decision of the administrative law judge.<sup>65</sup>

The new chapter of the Administrative Procedure Act contains other substantive provisions as well. It establishes the general qualifications and powers of administrative law judges.<sup>66</sup> It also contains more specific provisions relating to prehearing conferences,<sup>67</sup> *ex parte* communications,<sup>68</sup> and withdrawal and disqualification of administrative law judges.<sup>69</sup>

In the same session in which the legislature enacted Act 739, it added a new chapter on administrative enforcement and judicial review to the Environmental Quality Act.<sup>70</sup> The new chapter contains extensive provisions regarding adjudicatory hearings. Recognizing that inconsistencies existed between this statute and Act 739, the legislature provided that Act 739 controlled in cases of conflict.<sup>71</sup>

Some obvious inconsistencies do exist in the two statutes. First, Act 739 changes the name of the individuals responsible for conducting adjudicatory hearings from "hearing officers" to "administrative law judges."<sup>72</sup> Second, the responsibility for hiring and supervising administrative law judges shifts from the Secretary of the Department of Environmental Quality to the Secretary of the Department of State Civil Service.<sup>73</sup> Third and most important, the new chapter of the Environmental Quality Act allows the secretary to make the final administrative decision following an adjudicatory hearing, while the amendment to the Administrative Procedure Act gives the administrative law judge final decision making authority.<sup>74</sup>

Other provisions of the new chapter on enforcement procedures and judicial review seem supplementary to Act 739. Section 2050.4 prescribes the form and content for requesting an adjudicatory hearing;<sup>75</sup> it also grants the respondent a right to an adjudicatory hearing on a compliance order or penalty assessment<sup>76</sup> and gives the secretary discretion to grant an adjudicatory hearing when one is requested by any other aggrieved person.<sup>77</sup> Section 2050.11 covers intervention

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65. See La. R.S. 30:2050.21(A) (Supp. 1997) (allowing judicial review of any final permit action, declaratory ruling, or enforcement action), 2004(8) (1989) (defining "person" to include "the state of Louisiana [and] political subdivisions of the state of Louisiana").

66. La. R.S. 49:994(A)-(D) (Supp. 1997).

67. La. R.S. 49:998(A)-(E) (Supp. 1997).

68. La. R.S. 49:998(F) (Supp. 1997).

69. La. R.S. 49:999 (Supp. 1997).

70. 1995 La. Acts No. 947, § 1, adding La. R.S. 30:2050.1-.29 (Supp. 1997).

71. 1995 La. Acts No. 947, § 8.

72. Compare La. R.S. 49:994 (Supp. 1997) with La. R.S. 30:2050.13 (Supp. 1997).

73. Compare La. R.S. 49:994(A), 995, 997 (Supp. 1997) with La. R.S. 30:2050.13, .14(C) (Supp. 1997).

74. Compare La. R.S. 49:992(B)(2) (Supp. 1997) with La. R.S. 30:2050.17 (Supp. 1997).

75. La. R.S. 30:2050.4(B), (D) (Supp. 1997).

76. La. R.S. 30:2050.4(A) (Supp. 1997).

77. La. R.S. 30:2050.4(B) (Supp. 1997).

in enforcement proceedings,<sup>78</sup> withdrawal of requests for hearings,<sup>79</sup> and timing of a public hearing held in conjunction with an adjudicatory hearing.<sup>80</sup> Finally, the new chapter directs the secretary to issue rules "requiring that the record of adjudication be assembled in a uniform and consistent order and contain those things listed by the Administrative Procedure Act."<sup>81</sup>

Litigation may be necessary to decide if a final group of provisions are supplementary to, or inconsistent with, the provisions of Act 739. The new chapter in the Environmental Quality Act prescribes special qualifications and ethical standards for hearing officers in environmental cases,<sup>82</sup> and defines the powers of a hearing officer during the hearing.<sup>83</sup> In addition, it allows the secretary (not the hearing officer) to limit the scope of an adjudicatory hearing to questions of law and disputed questions of fact<sup>84</sup> and to stay compliance orders pending resolution of judicial appeals.<sup>85</sup>

#### *D. Permits*

The most important development with respect to permit procedures was the legislature's failure to adopt the permit provisions of the law institute proposal. Opposition to the permit provisions of the proposal contributed to the legislature's decision to defer action on the law institute bill in 1994. When the legislature returned to the subject in 1995, it substituted a bill from which the permit provisions had been deleted for the law institute bill.

Some significant procedural constraints already exist with respect to permits. The Environmental Quality Act establishes time limits for various steps in the permitting process<sup>86</sup> and grants an applicant the right to seek a *de novo* hearing in the Nineteenth Judicial District Court if the secretary refuses to hold an adjudicatory hearing on a permit application.<sup>87</sup> This later requirement is particularly significant now that the legislature has transferred the final decision making authority following an adjudicatory hearing from the secretary to the administrative law judge.<sup>88</sup>

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78. La. R.S. 30:2050.11(B) (Supp. 1997).

79. La. R.S. 30:2050.11(C) (Supp. 1997).

80. La. R.S. 30:2050.11(D) (Supp. 1997). The section also requires that the record of the public hearing must "be made available to the parties to the adjudicatory hearing." La. R.S. 30:2050.11(E) (Supp. 1997).

81. La. R.S. 30:2050.20 (Supp. 1997).

82. La. R.S. 30:2050.14 (Supp. 1997).

83. La. R.S. 30:2050.15 (Supp. 1997).

84. La. R.S. 30:2050.4(C) (Supp. 1997).

85. La. R.S. 30:2050.22(B) (Supp. 1997).

86. La. R.S. 30:2022 (Supp. 1997).

87. La. R.S. 30:2024(C) (Supp. 1997). *See also* La. R.S. 30:2050.29(B) (Supp. 1997) (allowing a suit for *de novo* review if the secretary fails to grant a request for an adjudicatory hearing "within thirty days after the timely filing of the request").

88. La. R.S. 49:992(B)(2) (Supp. 1997). *See supra* notes 64-65 and accompanying text.

### E. Enforcement

In 1995, the legislature added a chapter on enforcement procedure and judicial review to the Environmental Quality Act.<sup>89</sup> Basically, the 1995 legislation establishes uniform procedures for handling administrative enforcement actions in all of the divisions of the Department of Environmental Quality. Unfortunately, however, those procedures are inconsistent in some important respects with the adjudication provisions that the same legislature enacted in Act 739.<sup>90</sup> In cases of conflict, Act 739 controls.<sup>91</sup>

The new chapter on enforcement procedures grants additional protections to the respondent.<sup>92</sup> It requires the secretary to establish "policies and procedures to address violations of [the Act] in a formal and consistent manner"<sup>93</sup> as well as "criteria for the assessment of reasonably consistent department-wide penalties based upon the factors enumerated in [the Act]."<sup>94</sup> The most important change made by the 1995 amendment is to grant the respondent a right to an adjudicatory hearing on a proposed compliance order or penalty assessment;<sup>95</sup> the secretary may, however, limit the scope of the hearing to any "disputed issue" of material fact or of law.<sup>96</sup> The new chapter also requires the issuance of a notice of violation *before* a penalty is assessed for a violation<sup>97</sup> and mandates that the assistant secretary for legal affairs and enforcement review all compliance orders and penalty assessments "for legal sufficiency" before they are issued.<sup>98</sup> Finally, the 1995 legislation provides that an administrative enforcement action is "abandoned" if the department fails to take any steps to complete an enforcement action within two years after first issuing a compliance order or penalty assessment.<sup>99</sup>

The new chapter also contains provisions designed to facilitate public participation in administrative enforcement actions. The secretary must maintain "in a place accessible to the public" a list of all administrative enforcement actions commenced within the preceding twelve months; on a "periodic basis,"

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89. 1995 La. Acts No. 947, § 1, adding La. R.S. 30:2050.1-.29 (Supp. 1997).

90. See *supra* notes 58-69 and accompanying text.

91. 1995 La. Acts No. 947, § 8.

92. The respondent is "the person against whom an enforcement action is directed." La. R.S. 30:2004(20) (Supp. 1997), amended by 1995 La. Acts No. 947, § 2.

93. La. R.S. 30:2050.1(A) (Supp. 1997). See also La. R.S. 30:2050.3(A) (Supp. 1997) (duty to establish "criteria for the assessment of reasonably consistent department-wide penalties based on the factors enumerated in [the Environmental Quality Act]"). Prior to the 1995 amendment, La. R.S. 30:2025(A)(2) appeared to establish a similar obligation, but it has never been enforced in any judicial decision. See Murchison, *supra* note 1, at 517.

94. La. R.S. 30:2050.3(A) (Supp. 1997).

95. La. R.S. 30:2050.4(A) (Supp. 1997).

96. La. R.S. 30:2050.4(C) (Supp. 1997).

97. La. R.S. 30:2050.3(B) (Supp. 1997).

98. La. R.S. 30:2050.1(C) (Supp. 1997). Cf. La. R.S. 30:2050.10(A)(5) (Supp. 1997) (imposing a similar requirement for declaratory orders).

99. La. R.S. 30:2050.9 (Supp. 1997).

the secretary must mail copies of the list to persons who have requested that they be placed on the mailing list.<sup>100</sup> When an adjudicatory hearing is held on a compliance order or penalty assessment, the secretary must provide an opportunity for public comment "[p]rior to the adjudicatory hearing,"<sup>101</sup> and the secretary "may" hold "a public hearing . . . in connection with an adjudicatory hearing."<sup>102</sup> In addition, the secretary must provide for public comment on a proposed settlement or compromise,<sup>103</sup> and the secretary "may" hold a public hearing when the "secretary finds significant degree of public interest in the settlement or compromise."<sup>104</sup>

The new chapter provides procedures for four types of administrative responses to violations of the Environmental Quality Act.<sup>105</sup> First, the secretary or an assistant secretary may (and *must* before imposing a penalty) issue a notice of violation.<sup>106</sup> Second, the secretary or an assistant secretary may issue a compliance order.<sup>107</sup> Third, the secretary or an assistant secretary may assess a civil penalty.<sup>108</sup> Fourth, for violations that are "endangering or causing damage to public health or the environment," the secretary may issue an emergency cease and desist order.<sup>109</sup>

Because a notice of violation imposes no judicially enforceable obligation on a respondent, the procedural requirements for a notice are minimal. It must "describe with reasonable specificity the nature of the violation and . . . advise the respondent that further enforcement action may be taken if compliance is not promptly achieved."<sup>110</sup> Before a penalty can be imposed administratively, the secretary or an assistant secretary must issue a notice of violation that advises "the respondent that the assessment of a penalty is under consideration" and must also provide ten days for the filing of written comments.<sup>111</sup>

The new chapter establishes a common procedure for issuing compliance orders and assessing penalties. The secretary or assistant secretary issues the order or assessment.<sup>112</sup> Within thirty days, the respondent may de-

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100. La. R.S. 30:2050.1(B) (Supp. 1997).

101. La. R.S. 30:2050.4(I) (Supp. 1997).

102. La. R.S. 30:2050.12(A) (Supp. 1997).

103. La. R.S. 30:2050.7(B) (Supp. 1997).

104. La. R.S. 30:2050.7(D) (Supp. 1997).

105. For a description of the various administrative enforcement options, see Murchison, *supra* note 1, at 515-39.

106. La. R.S. 30:2050.2(A), .3(B)(1) (Supp. 1997).

107. La. R.S. 30:2050.2(A), .25(B), .26 (Supp. 1997).

108. La. R.S. 30:2050.3(C), .25(B), .26 (Supp. 1997).

109. La. R.S. 30:2050.8 (Supp. 1997).

110. La. R.S. 30:2050.2(A) (Supp. 1997).

111. La. R.S. 30:2050.3(B) (Supp. 1997).

112. La. R.S. 30:2050.2(A), .3(B), .25(B), .26 (Supp. 1997). A compliance order must describe "with reasonable specificity the nature of the violation," include "a timetable for achieving compliance," "[n]otify the respondent of the right to an adjudicatory hearing," and "[a]dvise the respondent that civil penalties may be assessed for a violation." La. R.S. 30:2050.2(B) (Supp. 1997). A penalty assessment must "[d]escribe, with reasonable specificity, the violation that gives rise to the

mand<sup>113</sup> (and any "aggrieved party" may request<sup>114</sup>) an adjudicatory hearing. Following the adjudicatory hearing, the chapter provides that the secretary makes the final administrative decision; obviously, however, this last provision conflicts with the provisions of the new chapter of the Administrative Procedure Act that is described above.<sup>115</sup>

The secretary's power to issue an emergency cease and desist order is quite broad. The secretary has discretion to issue the order without holding a hearing; the order is "effective upon the signing of the order"; and the respondent must comply with it "immediately upon receiving knowledge of the order."<sup>116</sup> The chapter limits the secretary's broad power in two ways: the order expires in fifteen days,<sup>117</sup> and the respondent may file an immediate action for injunctive relief.<sup>118</sup>

The new enforcement chapter also addresses other matters. It allows the secretary to establish "informal procedures" for compliance orders and penalty assessments, but those procedures may only be used with the consent of the respondent.<sup>119</sup> In addition, it allows the secretary to compromise or to settle compliance orders and to compromise or to settle penalty assessments "with the concurrence of the attorney general."<sup>120</sup>

#### F. Declaratory Rulings

The Administrative Procedure Act authorizes administrative agencies to issue declaratory orders regarding the applicability of statutes and rules to specific factual situations.<sup>121</sup> However, the decision to grant a declaratory order is discretionary with the agency, and—like most (probably all) state agencies—the Department of Environmental Quality has never even adopted any rules for issuing declaratory orders. The law institute proposal for reforming the procedures of the Department of Environmental Quality required the secretary

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penalty," state "the amount of the penalty," and "[n]otify the respondent of the right to an adjudicatory hearing." La. R.S. 30:2050.3(C)(2) (Supp. 1997).

113. La. R.S. 30:2050.4(A) (Supp. 1997).

114. La. R.S. 30:2050.4(B) (Supp. 1997). The secretary has discretion to grant the request "when equity and justice require." *Id.*

115. La. R.S. 49:992(B)(2) (Supp. 1997). See *supra* notes 64-65 and accompanying text.

116. La. R.S. 30:2050.8(A), (C) (Supp. 1997). An emergency cease and desist order must "[d]escribe with specificity the activity occurring at the facility or the site that is endangering or causing damage to public health or the environment," identify the particular "threat to public health or the environment that the activity presents," and "[s]pecify the measures that the owner or operator of the facility or the site is directed to undertake immediately in order to abate or to eliminate the danger or the damage to public health or the environment." La. R.S. 30:2050.8(B) (Supp. 1997).

117. La. R.S. 30:2050.8(D) (Supp. 1997). To extend an order beyond fifteen days, the secretary may file an action for declaratory relief. La. R.S. 30:2050.8(E) (Supp. 1997).

118. La. R.S. 30:2050.8(F) (Supp. 1997).

119. La. R.S. 30:2050.6(A) (Supp. 1997).

120. La. R.S. 30:2050.7(A) (Supp. 1997).

121. La. R.S. 49:962 (1987).

to issue rules for declaratory rulings, and the legislature included the declaratory ruling section in the 1995 legislation that added a chapter on enforcement procedure and judicial review to the Environmental Quality Act.<sup>122</sup>

The direct burden imposed on the Department of Environmental Quality by the 1995 legislation is relatively modest. The statute requires the secretary to issue rules for issuing declaratory orders and prescribes some minimum requirements; however, the content of the rules is largely left to the discretion of the secretary.<sup>123</sup> The secretary may modify a previous declaratory ruling, but the modification only applies prospectively.<sup>124</sup>

Any person with "a real and actual interest" in a matter may petition for a declaratory ruling.<sup>125</sup> The secretary must respond to the petition within sixty days, but the secretary has discretion as to whether to issue a declaratory ruling.<sup>126</sup> If the secretary declines to issue a declaratory ruling, the petitioner may "proceed" with an action for a declaratory judgment under the Administrative Procedure Act or the Code of Civil Procedure.<sup>127</sup> If the secretary issues a declaratory ruling, the ruling is a final agency action that can be appealed by any "aggrieved person."<sup>128</sup>

### G. Judicial Review

In 1995, the legislature enacted conflicting provisions regarding judicial review. Act 947 provided for appeals of permit actions, declaratory rulings, and enforcement actions in the First Circuit Court of Appeal.<sup>129</sup> However, Act 1208 provided for review in the Nineteenth Judicial District Court.<sup>130</sup>

Aware of the conflicting provisions in the bills that became Acts 947 and 1208, the legislature provided that those of Act 1208 would control if both bills

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122. La. R.S. 30:2050.10 (Supp. 1997).

123. La. R.S. 30:2050.10(A) (Supp. 1997). The rules must include six elements:

- (1) The form, content, and filing of a petition. . . .
- (2) The procedural rights of the person seeking a declaratory ruling.
- (3) The disposition of the petition.
- (4) A fee, to be paid by the petitioner, sufficient to defray the expenses of issuing the ruling.
- (5) Concurrence as to legal sufficiency by the assistant secretary for legal affairs and enforcement.
- (6) A requirement that the secretary shall maintain, in a place accessible to the public, a list of all petitions for declaratory rulings that have been filed.

*Id.*

124. La. R.S. 30:2050.10(G) (Supp. 1997).

125. La. R.S. 30:2050.10(B) (Supp. 1997).

126. La. R.S. 30:2050.10(C) (Supp. 1997).

127. *Id.*

128. La. R.S. 30:2050.10(F), 2050.21(A) (Supp. 1997). See *infra* notes 129-138 and accompanying text.

129. 1995 La. Acts No. 947, § 1, enacting La. R.S. 30:2050.21(A) (Supp. 1997).

130. 1995 La. Acts No. 1208, § 2, amending La. R.S. 30:2024(C) (Supp. 1997).

were enacted into law.<sup>131</sup> The first circuit temporarily frustrated this intent when it held that Act 1208 was unconstitutional,<sup>132</sup> but the legislature reestablished judicial review in the district court in the 1996 special session.<sup>133</sup>

Following the 1996 amendment, the Environmental Quality Act allows any "aggrieved person" to appeal a final permit action, declaratory ruling, or enforcement action to the Nineteenth Judicial District Court.<sup>134</sup> It also permits the respondent to appeal a penalty suspensively<sup>135</sup> and allows the secretary or the district court to stay a compliance order while a judicial appeal is pending.<sup>136</sup> Although the district court is authorized to promulgate rules of procedure for appeals,<sup>137</sup> the court's review is "confined to the record of adjudication," and the Administrative Procedure Act provides the "standard of review."<sup>138</sup>

## II. SIGNIFICANCE OF THE CHANGES

More important than cataloguing the recent changes is assessing their impact. The section that follows offers an individualized analysis of the various changes. The final section appraises the changes as a whole.

### A. Fees

Arguably, the constitutional amendment regarding assessment of fees<sup>139</sup> is the most important of the recent changes. Over time, the amendment is likely to reduce the funds available for environmental regulation enforcement. This prospect is particularly ominous in light of the continuing reduction in the funds available from the federal government.

As a practical matter, the new constitutional provision will grant the regulated community a veto authority over future fee increases. One-third of the members of either house of the legislature can block any new fee or any increase in an existing fee, and the entities subject to environmental regulation have always had more legislative influence than would be necessary to assemble that minority. As a result, future secretaries are likely to limit themselves to increases that the regulated industry concludes will inure to its benefit. Surely,

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131. 1995 La. Acts No. 947, § 8.

132. *In re Rubicon, Inc.*, 670 So. 2d 475 (La. App. 1st Cir. 1996).

133. 1996 La. Acts No. 41, § 1 (First Extraordinary Session). The legislature made the change retroactive, and the first circuit sustained the constitutionality of the retroactivity provision. *In re Angus Chem. Co.*, 679 So. 2d 454 (La. App. 1st Cir. 1996).

134. La. R.S. 30:2050.21(A) (Supp. 1997).

135. La. R.S. 30:2050.22(A) (Supp. 1997).

136. La. R.S. 30:2050.22(B) (Supp. 1997).

137. La. R.S. 30:2050.21(B) (Supp. 1997).

138. La. R.S. 30:2050.21(C) (Supp. 1997). See La. R.S. 49:964(F) (1987) (Administrative Procedure Act provisions regarding standard of review in judicial appeals).

139. La. Const. art. VII, § 2.1. See *supra* notes 21-24 and accompanying text.

one does not have to be too great a cynic to classify as minimal the likelihood that the regulated community will conclude that stricter regulations or more vigorous enforcement of existing regulations will provide such benefits.

Evidence of the likely consequences of a more cooperative attitude towards polluters is already available. The department's recent statistics indicate a decline in the number of enforcement actions.<sup>140</sup> Unfortunately, the trend will probably continue now that new funds for environmental initiatives require a superlegislative majority.

In one very important respect, the new amendment is ambiguous: To what extent does its requirement of legislative approval for "[a]ny new . . . civil fine" limit the secretary's ability to impose civil penalties? Obviously, the department imposes a "new" penalty every time it levies a penalty for a violation. If the requirement for approval by a supermajority of the legislature applies to every penalty, the constitutional amendment will effectively eliminate administrative imposition of penalties, a change that was never advertised if it was intended by the sponsors.

One can suggest two ways that the courts could avoid this unfortunate consequence. The courts could exclude penalties from the definition of what constitutes a "civil fine," but that construction seems to render the constitutional language meaningless. A preferable approach would limit the constitutional language to quasi-legislative actions of prescribing fees and fines to a category of activities. This construction of the amendment would hold the new requirement for legislative approval inapplicable when an agency acts in a quasi-judicial capacity to apply an existing fee or fine structure to a particular individual. Under this construction, the administrative assessment of a civil penalty would be a quasi-judicial action to which the constitutional amendment does not apply.

One may reasonably anticipate that Louisiana's appellate courts will avoid a construction of the Environmental Quality Act that would effectively eliminate administrative enforcement. Unfortunately, the ambiguity of the statute gives those who violate environmental regulations another argument to use to try to prevent the department from imposing some financial cost on those who violate the statute.

The recent statutory provisions relating to fees pale into insignificance in light of the constitutional amendment. The requirement that the secretary use rulemaking procedures for establishing or changing fees, the limitations on the amounts that fees can be increased, and the expanded provision for legislative oversight are obviously moot now that a supermajority of the legislature must approve all new and increased fees.

The new constitutional requirement is likely to limit severely the funds available to protect the environment. For the last two decades, Louisiana has

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140. Bob Anderson, *DEQ Penalties Down for Fiscal 1996*, Baton Rouge Advocate, Jan. 14, 1997, at B1.



relied on fees rather than general revenues to fund the Department of Environmental Quality. Unless the legislature now chooses to commit other funds for environmental protection, the prospects for new regulatory initiatives or an increased enforcement effort seem bleak.

### B. Rulemaking

The new procedural hurdles for rulemaking are likely to produce a result similar to the new requirements for imposing fees: The secretary will issue fewer rules. Although the limitations the new statutes impose are procedural rather than substantive, their combined impact will make it substantially more difficult for the secretary to adopt new rules. The new risk-assessment requirement,<sup>141</sup> the increased specificity required to justify emergency rules,<sup>142</sup> and the legislature's expanded authority to overturn rules<sup>143</sup> individually and (especially) collectively make it more difficult for the secretary to issue new rules. Even the alternate procedure for rules identical to federal rules that apply in the state<sup>144</sup> imposes a complicated set of steps with which the secretary must comply, although it does appear to permit the secretary to dispense with the duty to prepare a risk-assessment analysis. At a minimum, the new requirements will force the agency to devote additional personnel hours to each rule. The inevitable result will be fewer rules, an ironic result in light of the deadlines for issuing rules required to implement the new chapter on administrative enforcement.<sup>145</sup>

The new mandate to prepare a risk-assessment analysis for every proposed and final rule has the greatest potential for frustrating new regulatory initiatives. The regulated community is certain to argue that the risk-assessment requirement imposes substantive limits on the secretary's discretion. Even if the courts take a more deferential attitude toward the new risk assessments, one can confidently predict that opponents of every controversial rule will have another ground for challenging it.

The risk-assessment requirement is likely to deter the adoption of new rules in at least three ways. First, emphasizing the duty to rely on readily available "peer-reviewed scientific literature"<sup>146</sup> may delay action until after the existence of definite harm has been conclusively established, an approach that conflicts with the preventive approach for protecting the environment.<sup>147</sup> Second, the additional

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141. La. R.S. 49:953(G) (Supp. 1997). See *supra* notes 34-38 and accompanying text.

142. La. R.S. 49:953(B) (Supp. 1997). See *supra* note 52 and accompanying text.

143. La. R.S. 49:953(B), 968(G), 969 (Supp. 1997). See *supra* notes 53, 55-57 and accompanying text.

144. La. R.S. 49:953(F)(3) (Supp. 1997). See *supra* notes 39-50 and accompanying text.

145. See, e.g., 1995 La. Acts No. 947, § 4.

146. La. R.S. 49:953(G)(1)(a), (c) (Supp. 1997).

147. See, e.g., La. R.S. 30:2074(B)(1), 2052, 2154(A)(3), 2192(B)(2) (1989). Cf. 33 U.S.C. 1251(a) (1994); 42 U.S.C. §§ 6924(d), (e), (g), 6973, 7409(b), 7412(b)(2) (1994). See Kenneth M.

work required to prepare the risk-assessment—especially when combined with the loss of the ability to impose fees sufficient to cover the costs of the assessments<sup>148</sup>—will reduce the number of rules that can be issued. Third, the new requirement gives the regulated community an additional ground (independent of the substantive justification for the rule) to delay rules by arguing that the secretary has not discharged the new procedural duty. One can reasonably anticipate judicial challenges based on every aspect of the risk analysis provision: whether the department has adequately identified “the specific risks being addressed” and the readily available “published, peer-reviewed scientific literature,”<sup>149</sup> and whether the department has explained the comparative risk being addressed “relative to other risks of a similar or analogous nature to which the public is routinely exposed;”<sup>150</sup> the way in which the rule will “advance the purpose of protecting human health or the environment against the specified identified risks;”<sup>151</sup> and the basis for concluding that the rule “presents the most cost-effective method practically achievable to produce the benefits intended regarding the risks identified.”<sup>152</sup> When faced with potential challenges from a well-financed regulated entity, the secretary is likely to limit future rulemaking to cases where harm has already occurred and been documented in the scientific literature.

How severe the discouragement to new rules will be depends on how the courts interpret the new requirement. Although the Louisiana Supreme Court’s opinion in *Save Ourselves, Inc. v. Louisiana Environmental Control Commission*<sup>153</sup> requires the secretary to prepare a risk analysis before making certain decisions, the courts have generally deferred to the secretary’s determination of how detailed the analysis should be.<sup>154</sup> If the courts take a similarly deferential attitude to the risk-assessment duty imposed by the legislature, the substantive impact will be modest. On the other hand, the impact will be great if the courts decide that the new legislative mandate requires them to second guess the secretary’s decision about what constitutes an adequate assessment of the risks posed by an activity for which regulations are being proposed.

Even if the courts limit the substantive impact of the new risk-assessment requirement, the very existence of the obligation will still deter the secretary from issuing new rules. Documenting (and redocumenting before a final rule is issued) will be time consuming, and spending more time on each rule without increased

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Murchison, *Environmental Law in Australia and the United States: A Comparative Overview (Part II)*, 11 *Env’t. L. & Plan. J.* 254, 255 (1994); see generally James Cameron & Julie Abouchar, *The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment*, 14 *B.C. Int’l & Comp. L. Rev.* 1 (1991).

148. La. Const. art. VII, § 2.1. See *supra* notes 21-24 and accompanying text.

149. La. R.S. 49:953(G)(1)(a) (Supp. 1997).

150. La. R.S. 49:963(G)(1)(b) (Supp. 1997).

151. La. R.S. 49:963(G)(1)(c) (Supp. 1997).

152. La. R.S. 49:963(G)(1)(d) (Supp. 1997).

153. 452 So. 2d 1152 (La. 1984).

154. See, e.g., *In re Dravo Basic Materials, Inc.*, 604 So. 2d 630, 635-36 (La. App. 1st Cir. 1992).

funding means that fewer rules will be issued. Moreover, in some areas, the scholarly literature may be so vast that mastering it will make the delay permanent in fact if not in theory.

The other new statutory provisions are also likely to delay and to deter new rules. The new procedures that the secretary can use when adopting state rules identical to existing federal rules<sup>155</sup> are so cumbersome as to defeat the basic purpose of expediting the adoption of rules that do not alter the underlying substantive law. Similarly, the requirement for more precise justifications for emergency rules<sup>156</sup> are likely to make agencies less inclined to respond immediately to threats to public health or the environment. Finally, broader authority for the legislature to override rules<sup>157</sup> will also deter the secretary from using the rulemaking process in controversial cases.

### C. Adjudications

The 1995 legislative changes relating to the way adjudications are conducted in Louisiana will drastically alter the way the Department of Environmental Quality does business. In the past, the department has regularly used adjudications to resolve specific controversies. The new statutes may encourage the department to seek other methods for resolving some of those disputes.

The least controversial aspects of the changes relate to the status of administrative law judges. Calling those who preside at adjudications administrative law judges instead of hearing officers<sup>158</sup> may enhance their prestige, and it may create some confusion about the extent of their powers; but it does not alter their authority.<sup>159</sup> On the other hand, the transfer of appointing and supervising authority to the Department of State Civil Service<sup>160</sup> was a modest, but desirable change. Although no one has offered any evidence of improper secretarial influence over a hearing officer, making the hearing officer subject to the supervision of the secretary did create at least the appearance of departmental influence. The change will be unfortunate, however, if the courts construe the provisions of the Environmental Quality Act relating to the qualifications and powers of hearing officers and the mechanics of conducting hearings<sup>161</sup> as

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155. La. R.S. 49:953(F)(3) (Supp. 1997). See *supra* notes 39-50 and accompanying text.

156. La. R.S. 49:953(B) (Supp. 1997). See *supra* notes 52-54 and accompanying text.

157. La. R.S. 49:953(B)(4), 968(G) (Supp. 1997). See *supra* notes 53, 55-57 and accompanying text.

158. La. R.S. 49:994 (Supp. 1997). See *supra* notes 62-63 and accompanying text.

159. As the second circuit has recently emphasized, administrative hearing officers are not "judges" even when they are denominated "administrative law judges." *Walker v. Conagra Food Services*, 671 So. 2d 1218 (La. App. 2d Cir. 1996).

160. La. R.S. 49:991 (Supp. 1997).

161. La. R.S. 30:2050.14, .15 (Supp. 1997). Interestingly, the requirement that hearing officers in the Department of Environmental Quality be familiar with the underlying scientific principles and the relevant legal framework antedated the new chapter on environmental enforcement procedures and judicial review. See La. R.S. 30:2018(B) (1989), repealed by 1995 La. Acts No. 947, § 3.

inconsistent with the new chapter on adjudications in the Administrative Procedure Act.<sup>162</sup>

The most pernicious of the changes concerning adjudications is the provision transferring the final administrative decision in contested cases to the administrative law judge. In essence, the legislature has transferred final administrative authority from the politically accountable head of the department to an administrative law judge who is (or, at least, should be) immune from political influence and who may well be ignorant of the scientific basis of the underlying controversy<sup>163</sup> as well as the impact of the decision on other programs of the department. For the Department of Environmental Quality, the new provision seriously compromises the secretary's position as head of the department that is "the primary agency in the state concerned with environmental protection and regulation."<sup>164</sup> In the *Save Ourselves* decision,<sup>165</sup> the supreme court declared that this position imposed special responsibilities on the secretary to implement the constitutional commitment to protection of the state's natural resources.<sup>166</sup> The loss of decision making authority is particularly critical in permit cases where the legislature has reinforced the constitutional mandate by directing that the secretary is to "act as the primary public trustee of the environment" when making decisions "relative to the granting or denying of permits."<sup>167</sup>

Making the administrative law judge responsible for the final administrative decision also dramatically alters the process for reaching administrative decisions in contested cases. Since the Environmental Control Commission was abolished in 1983,<sup>168</sup> assistant secretaries have initially issued draft permits as well as compliance orders and penalty assessments. If the applicant, respondent, or a member of the public objected, the case was generally referred to an adjudicatory hearing with the secretary making the final decision when any party to the hearing objected to the proposed order or decision of the hearing officer.<sup>169</sup> Act 739 alters this process by making the decision of the administrative law judge (the new name for the hearing officer) the final administrative decision

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162. La. R.S. 49:994(D), 998 (Supp. 1997). See *supra* notes 72-85 and accompanying text.

163. See *supra* note 82 and accompanying text (raising issue of whether requirements of La. R.S. 30:2050.14 regarding qualifications of hearing officers in environmental cases was implicitly repealed by 1995 La. Acts No. 739).

164. La. R.S. 30:2011(A)(1) (1989).

165. 452 So. 2d 1152 (La. 1984).

166. La. Const. art. IX, § 1. The constitutional provision provides:

The natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people. The legislature shall enact laws to implement this policy.

167. La. R.S. 30:2014(A) (1989).

168. La. R.S. 30:2013 (1989).

169. The administrative enforcement chapter that the legislature added to the Environmental Quality Act codified this procedure. See La. R.S. 30:2050.17 (1989); *supra* notes 112-114 and accompanying text.

with no opportunity of appeal to, or review by, the secretary.<sup>170</sup> As a practical matter, the new provisions will completely eliminate the secretary from the decision making process unless the department alters its procedures to involve the secretary *before* the adjudicatory hearing is held.<sup>171</sup>

The secretary may try to retain final authority over some decisions on the basis of the exception applicable when compliance with the new adjudication procedures conflict with a federal mandate.<sup>172</sup> The Department of Environmental Quality administers federal programs relating to air pollution, water pollution, and hazardous wastes.<sup>173</sup> To retain that authority, the state must comply with the requirements of federal law,<sup>174</sup> including the submission of any changes in the state program to the federal Environmental Protection Agency (EPA) for approval.<sup>175</sup> At a minimum, EPA might insist that the state submit the new procedures for approval before they apply to federal programs. Moreover, if EPA finds that transferring final administrative authority to an administrative law judge would violate the requirements of the relevant federal statute, the federal-mandate exemption of Act 739 might apply permanently.

Almost as lamentable is the uncertainty created by the new statutory provisions. First, as explained above,<sup>176</sup> the new chapter on environmental procedures contains several significant provisions that may or may not be held to be inconsistent with the new provisions of the Administrative Procedure Act. More importantly, the new provisions of the Administrative Procedure Act fail to define the powers of the administrative law judges with precision.

An administrative decision on a permit or an enforcement action has three components: a determination of the facts on which the decision is based, a construction of the applicable law, and the exercise of discretion to decide which one of the legally permissible decisions is appropriate. Ordinarily, courts are very deferential to an agency's factual determination, reversing the agency only when the agency's decision is "[m]anifestly erroneous in view of the reliable, probative, and substantial evidence on the whole record."<sup>177</sup> On questions of law, the authority of the courts is much broader; they are the ultimate experts in legal interpretation, even though—when the statutory language is unclear—they may defer to an agency's reasonable interpretation of a statute.<sup>178</sup> Finally, the

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170. La. R.S. 49:992(B)(2) (Supp. 1997).

171. See La. R.S. 30:2050.25(B) (Supp. 1997) (allowing the secretary to act personally with respect to any matter that the administrative enforcement chapter authorizes an assistant secretary to act).

172. La. R.S. 49:992(D)(2) (Supp. 1997). See *supra* note 61 and accompanying text.

173. See 33 U.S.C. § 402(b) (1994) (Clean Water Act), 42 U.S.C. § 6926(b) (1994) (Resource Conservation and Recovery Act); 42 U.S.C. § 7410(a)(2), (k)(3) (1994) (Clean Air Act).

174. 33 U.S.C. § 402(c)(2) (1994) (Clean Water Act); 42 U.S.C. § 6926(c) (1994) (Resource Conservation and Recovery Act); 42 U.S.C. § 7410(a)(2)(A) (1994) (Clean Air Act).

175. This requirement is explicit in the Clean Air Act. 42 U.S.C. § 7410(a)(2)(H) (1994).

176. See *supra* notes 75-77 and accompanying text.

177. La. R.S. 49:964(G)(6) (1987).

178. See, e.g., *In re Recovery I, Inc.*, 635 So. 2d 690, 696 (La. App. 1st Cir.), *writ denied*, 639 So. 2d 1169 (La. 1994). At the federal level, the Supreme Court's application of this principle in

authority of the courts to overturn an agency's choice from legally permissible alternatives is very limited. A court can reverse the agency's decision only if it is "arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion."<sup>179</sup>

The new statute making the decision of the administrative law judge final makes no attempt to define what deference, if any, the administrative judge must give to the decision of the agency. The sensible result is to give the administrative law judge broad power to find facts but to require deference on questions of statutory interpretation and agency discretion.

On the factual question, the administrative law judge should make a de novo decision. Louisiana requires an agency to produce legally admissible evidence to support its administrative decision.<sup>180</sup> The adjudication provides the applicant or respondent an opportunity to force the agency to satisfy that requirement as well as to cross-examine agency witnesses and to introduce evidence to contradict the agency's position.<sup>181</sup> Giving deference to a factual decision made before the hearing would make the adjudication an empty formality.

The decision of the agency with respect to legal issues should not bind the administrative law judge, but he or she should give the agency at least as much deference as a court would give. The agency, not the administrative law judge, is responsible for administering the statute, and the agency also has the expertise to determine what approaches are likely to be effective in solving the problems the legislature has directed the agency to address. Of course, an agency might make a decision that is unreasonable or conflicts with the clear language of the statute. Allowing an administrative law judge to reject the agency's legal position in such cases causes little difficulty so long as the agency can obtain judicial review of the administrative decision.

The real battleground is likely to concern the matter of discretionary choices that the agency is authorized to make. If the agency's decision is legally permissible under the facts established in the adjudicatory hearing, the courts

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Chevron, *USA v. National Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778 (1984), has sparked much commentary. See, e.g., Thomas W. Merrill, *Judicial Deference to Administrative Precedent*, 101 Yale L.J. 969 (1992); Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 Wash. U. L.Q. 351 (1994); Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 Duke L.J. 984; Kenneth W. Starr et al., *Judicial Review of Administrative Action in a Conservative Era*, 39 Admin. L. Rev. 353 (1987); Cass R. Sunstein, *Law and Administration after Chevron*, 90 Colum. L. Rev. 2071 (1990).

179. La. R.S. 49:964(G)(5) (1987). See, e.g., *In re Supplemental Fuels, Inc.*, 656 So. 2d 29, 39 (La. App. 1st Cir. 1995); *In re Recovery I, Inc.*, 635 So. 2d 690, 699-700 (La. App. 1st Cir.), writ denied, 639 So. 2d 1169 (La. 1994).

180. Although hearsay evidence is admissible in administrative hearings, La. R.S. 49:956 (1987), the agency cannot rely on evidence that would be inadmissible in judicial proceedings as the "sole" basis for its decision. See, e.g., *Bourque v. Louisiana State Racing Comm'n*, 611 So. 2d 742 (La. App. 4th Cir. 1992); *Lee v. Brown*, 148 So. 2d 321 (La. App. 3d Cir. 1962).

181. La. R.S. 49:955(C) (1987).

should require the administrative law judge to accept the agency's resolution of the matter. To grant the administrative law judge authority to reverse the discretionary choice of the agency would be to construe a procedural amendment as effecting a massive shift in the substantive authority of state agencies. In the specific case of the Department of Environmental Quality, it would also be inconsistent with the legislative directives<sup>182</sup> that the secretary is primarily responsible for fulfilling the state's constitutional duty to protect the environment.<sup>183</sup>

#### D. Permits

Because the legislature rejected the law institute's proposal establishing uniform procedures for all permits issued by the Department of Environmental Quality, the department is likely to continue processing permits as it has done in the past. The statutory requirements are minimal, and the rules establishing each permit program set forth the various requirements.

The changes regarding adjudications and judicial review may have a significant practical impact on the processing of environmental permits. Nothing in the Environmental Quality Act grants an applicant the right to an adjudicatory hearing, but the judicial review section does authorize the applicant to petition for a *de novo* hearing in the Nineteenth Judicial District Court if a request for an adjudicatory hearing is denied.<sup>184</sup> In the past, that possibility virtually guaranteed that the secretary would grant the request for an adjudicatory hearing. Now, however, the secretary loses final decision-making authority following an adjudication,<sup>185</sup> and the case will be reviewed in the district court regardless of whether the secretary grants the request for a hearing.<sup>186</sup> In light of these changes, the secretary may find the prospect of a petition for *de novo* review in the district court less daunting.

#### E. Enforcement

The new Environmental Quality Act chapter on administrative enforcement<sup>187</sup> contains some positive aspects. First, it establishes a uniform procedure for administrative responses to violations of the various substantive laws that constitute the Environmental Quality Act.<sup>188</sup> Second, it clarifies and expands the rights of the respondent to challenge the agency's determinations about whether a violation occurred and, if so, what administrative sanction is appropriate.<sup>189</sup>

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182. La. R.S. 30:2011(A)(1), 2014(A) (1989). *See supra* notes 164-167 and accompanying text.

183. La. Const. art. IX, § 1. *See supra* notes 1, 166 and accompanying text.

184. La. R.S. 30:2024(C) (Supp. 1997).

185. La. R.S. 49:992(B)(2) (Supp. 1997). *See supra* note 64 and accompanying text.

186. La. R.S. 30:2050.21(A) (Supp. 1997). *See supra* notes 129-136 and accompanying text.

187. La. R.S. 30:2050.1-.29 (Supp. 1997). *See supra* notes 89-120 and accompanying text.

188. La. R.S. 30:2050.2-.5, .16-.17, .19 (Supp. 1997).

189. La. R.S. 30:2050.1(C), .3(B), .4(A), (C), .9 (Supp. 1997).

Third, it provides the public with greater information regarding environmental enforcement actions<sup>190</sup> and includes statutory authority allowing affected members of the public to participate in administrative enforcement actions.<sup>191</sup>

Other aspects of the new enforcement chapter are less likely to have significant practical impact. The new statutory provision regarding settlements and compromises<sup>192</sup> expands the secretary's power to act without seeking the concurrence of the Attorney General, but actual cases of conflict between the two agencies have been rare. Similarly, the department is unlikely to make extensive use of the informal procedures that the secretary can establish by rule.<sup>193</sup> The department may only use the new procedures if the respondent consents. If the respondent is agreeable, the secretary will probably find it easier to settle or to compromise the action without using formal or informal procedures.<sup>194</sup>

Unfortunately, the changes introduced by Act 739 frustrate many of the positive aspects of the new chapter on administrative enforcement of the Environmental Quality Act. Most importantly, it undermines the secretary's enforcement authority by making the administrative law judge responsible for making the final administrative decision.<sup>195</sup> In addition, it effectively eliminates the secretary from the administrative process that the statute prescribes. The new chapter on administrative enforcement provides for imposition of an initial sanction by an assistant secretary with an appeal to the secretary following the adjudicatory hearing;<sup>196</sup> however, Act 739 eliminates the appeal to the secretary. To retain any role in the process, the secretary will have to make use of the reserved authority to exercise any power that the Environmental Quality Act grants to an assistant secretary<sup>197</sup> and issue the sanction before the adjudication occurs. Finally, the amendments to the Act create uncertainty about the exact scope of the administrative law judge's authority to reserve a decision of the department as well as the continued viability of a number of the provisions of the Environmental Quality Act relating to adjudications and hearing officers.<sup>198</sup>

#### *F. Declaratory Rulings*

The impact of the new provision on declaratory rulings<sup>199</sup> remains unclear. The Administrative Procedure Act has long authorized the issuance of similar

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190. La. R.S. 30:2050.1(B) (Supp. 1997).

191. La. R.S. 30:2050.7(B), (D), .12(A) (Supp. 1997).

192. La. R.S. 30:2050.7 (Supp. 1997).

193. La. R.S. 30:2050.6 (Supp. 1997).

194. *In re BASF Corp., Chem. Div.*, 538 So. 2d 635, 642 (La. App. 1st Cir. 1988), *writ granted on other grounds*, 539 So. 2d 624, *writ denied*, 541 So. 2d 900 (1989), held that the secretary may hold informal meetings with a respondent to negotiate a settlement or compromise.

195. La. R.S. 49:992(B)(2) (Supp. 1997). *See supra* note 64 and accompanying text.

196. La. R.S. 30:2050.16, .17 (Supp. 1997).

197. La. R.S. 30:2050.25(B) (Supp. 1997).

198. *See supra* notes 75-85 and accompanying text.

199. La. R.S. 30:2050.10 (Supp. 1997). *See supra* notes 121-128 and accompanying text.



"declaratory orders,"<sup>200</sup> but neither the secretary nor any other agency has made extensive use of that authority. The new addition to the Environmental Quality Act attempts to force the secretary to use it by two means. It creates a judicially enforceable duty to issue rules governing declaratory rulings,<sup>201</sup> and it allows anyone who petitions for a declaratory ruling to file an action for a declaratory judgment if the secretary declines to issue a declaratory ruling in any particular case.<sup>202</sup>

Fortunately, the secretary retains control over the declaratory ruling process. The statute does not require the secretary to hold an adjudicatory hearing on a petition for a declaratory ruling. Thus, the secretary does not have to cede authority to make the final administrative decision to an administrative law judge.

The great danger of the new procedure is its potential to dilute the secretary's control over the department's regulatory agenda. If the courts construe the authority of a rejected petitioner to "proceed" to seek a declaratory judgment<sup>203</sup> to create an entitlement to a judicial decision on any regulatory dispute, the regulated community (or any other group that can satisfy the "aggrieved person" standard)<sup>204</sup> will have the power to decide what matters deserve the attention of the regulators. Such a holding would force the department to make a Hobson's choice: either use the limited agency resources to focus administratively on the problems that outsiders regard as most important, or lose the presumption of administrative regularity (and possibly consume greater agency resources) in defending a judicial action for a declaratory judgment. In an era of reduced funding, the impact of that loss of control over the regulatory agenda could greatly diminish the department's ability to address the problems that it regards as most pressing.

The courts can minimize the potential adverse impact of the new provision by applying traditional doctrines of administrative law. The new chapter on environmental enforcement merely authorizes the filing of a declaratory judgment action. It does not purport to change substantive doctrines (for example, ripeness) that limit the availability of declaratory relief under both the Administrative Procedure Act and the Code of Civil Procedure.<sup>205</sup>

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200. La. R.S. 49:962 (1987). The section appears to impose a mandatory duty to issue rules that establish a system for issuing declaratory orders and for promptly disposing of petitions. It does not, however, appear to require that a declaratory order must be issued with regard to any particular matter. Most agencies (including the Department of Environmental Quality) have not complied with the statutory duty to issue the necessary procedural rules for issuing declaratory orders.

201. La. R.S. 30:2050.10(A), .29(A) (Supp. 1997).

202. La. R.S. 30:2050.10(C) (Supp. 1997).

203. *Id.*

204. La. R.S. 30:2050.21(A) (Supp. 1997).

205. Louisiana courts, like their federal counterparts, have long held that "declaratory relief is available only to decide justiciable controversies, and that such enactments do not empower the courts to render advisory opinions on abstract questions of law." *Abbot v. Parker*, 259 La. 279, 249 So. 2d 908, 918 (Tate, J.), *appeal dismissed*, *Branton v. Parker*, 404 U.S. 931, 92 S. Ct. 281 (1971) (citing *Petition of Sewerage & Water Bd.*, 248 La. 169, 177 So. 2d 276 (1965)); *Stoddard v. City*

### G. Judicial Review

The new judicial review provisions have generated considerable political controversy. After an initial loss in the legislature,<sup>206</sup> opponents of the new provision obtained a judicial declaration that the statute transferring jurisdiction from the First Circuit Court of Appeal to the Nineteenth Judicial District Court was unconstitutional.<sup>207</sup> Almost immediately, supporters of the change obtained new legislation,<sup>208</sup> and the first circuit held that the new law was constitutional.<sup>209</sup>

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of New Orleans, 246 La. 417, 165 So. 2d 9 (1969); and *Poe v. Ullman*, 367 U.S. 497, 81 S. Ct. 1752 (1961). See also La. Code Civ. P. art. 1876 ("The court may refuse to render a declaratory judgment or decree where such judgment or decree, if rendered, would not terminate the uncertainty or controversy giving rise to the proceeding.").

The overriding requirement of a "justiciable controversy" can be analyzed in terms of several criteria, including the requirements: that the controversy be "actual" rather than hypothetical; that the plaintiff have "standing" (which includes, among other things, that the plaintiff show an injury in fact, directly traceable to some act or decision by the agency); and that the dispute be "ripe." As the *Abbott* court put it:

[A] "justiciable controversy" connotes, in the present sense, an existing actual and substantial dispute, as distinguished from one that is merely hypothetical or abstract, and a dispute which involves the legal relations of parties who have real adverse interests, and upon which the judgment of the court may effectively operate through a decree of conclusive character. Further, the plaintiff should have a legally protectable and tangible interest at stake, and the dispute should be of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

*Abbott*, 249 So. 2d at 918. For further discussion of various particular elements that determine whether a declaratory action presents a "justiciable controversy," see, e.g., *Louisiana Assoc. Gen. Contractors, Inc. v. State*, 669 So. 2d 1185, 1190-95 (La. 1996) (discussing requirements of organizational standing and non-mootness in the context of declaratory action); *American Waste & Pollution Control Co. v. St. Martin Parish Police Jury*, 627 So. 2d 158, 161-62 (La. 1993) (rejecting declaratory action as unripe because it was "based on a contingency which may not arise"); *Ricard v. State*, 544 So. 2d 1310, 1312 (La. App. 4th Cir. 1989) (lack of standing); *Atchafalaya Basin Levee District v. Pecquet*, 364 So. 2d 610 (La. App. 1st Cir. 1978) (lack of real adversity of interests); *Upper Audubon Ass'n v. Audubon Park Comm'n*, 329 So. 2d 209 (La. App. 4th Cir. 1976) (dismissing declaratory action as moot); *Rambin v. Caddo Parish Police Jury*, 316 So. 2d 499 (La. App. 2d Cir. 1975) (lack of adversity); 2 Steven Plotkin, *Louisiana Civil Procedure* 249-50 (1996); Wilson R. Ramshur, Comment, *Declaratory Judgments in Louisiana*, 33 La. L. Rev. 127, 130-34 (1972) (discussing issue generally, but focusing on requirement that the action be brought by a party with a real interest in the outcome, against a truly adverse opponent).

These requirements apply with full force to challenges to administrative acts or failures to act. See, e.g., *Peterson v. Louisiana Pub. Serv. Comm'n*, 671 So. 2d 460 (La. App. 1st Cir. 1995) (holding that declaratory action intended to establish whether the PSC had jurisdiction over nonprofit rural water system failed to present justiciable controversy); *Sholar v. East Baton Rouge Parish Council*, 393 So. 2d 290 (La. App. 1st Cir. 1981) (declaratory challenge to grant of zoning variances dismissed as moot).

The author expresses appreciation to Professor John Devlin of the Paul M. Hebert Law Center for his assistance in preparing this footnote.

206. 1995 La. Acts Nos. 947, § 8; 1208, § 1. See *supra* notes 129-133 and accompanying text.

207. *In re Rubicon, Inc.*, 670 So. 2d 475 (La. App. 1st Cir. 1996).

208. 1996 La. Acts No. 41, § 1.

209. *In re Angus Chem. Co.*, 679 So. 2d 454 (La. App. 1st Cir. 1996).

From a practical standpoint, the only certain impact of the new statute will be to delay the resolution of judicial challenges to decisions of the secretary. As with judicial review under the Administrative Procedure Act,<sup>210</sup> the new provision for judicial review under the Environmental Quality Act confines review to the administrative record,<sup>211</sup> and either party can appeal an adverse decision to the district court. In effect, the system now provides for three (district court, court of appeal, supreme court) rather than two (court of appeal, supreme court) levels of judicial review. That result is somewhat surprising in view of the contemporaneous provisions providing for a preliminary administrative review by granting responsibility for the final administrative decision to an administrative law judge rather than to the secretary.<sup>212</sup>

Some observers have suggested that district court scrutiny may be stricter in practice even though the legal standard is the same. They have identified three characteristics of district courts that may encourage closer scrutiny than is normally provided in the court of appeal: A district court routinely makes *de novo* decisions rather than merely affirming or reversing the decisions of lower courts; a district court will probably grant opponents of the administrative action more time for oral argument than is typically granted by an appellate court; and a district court can receive additional evidence if the administrative record is inadequate. Only experience with future litigation will confirm if these institutional differences will produce different results in actual cases.

### III. THE DESIRABILITY OF THE CHANGES

No assessment of the overall impact of the recent changes affecting environmental procedures is value-neutral. Any evaluation of the desirability of the new statutory provisions depends on the perspective of the observer.

Environmental regulations are always costly, especially when they are vigorously enforced. Thus, the regulated community normally wants to avoid both regulations and enforcement whenever possible. Regulated entities also prefer to reduce public input and to delay regulation and enforcement when permanent avoidance is impossible. Finally, those subject to environmental regulations tend to favor reduced administrative discretion over the content and priorities of the regulatory agenda as well as increased grounds and venues for challenging regulations and defending enforcement actions.

Judged from the perspective of the regulated community, the new procedures described in this article are highly desirable. By limiting the funding available to the Department of Environmental Quality and enacting substantial new hurdles to the issuance of rules and administrative sanctions, fewer regulatory initiatives and less administrative enforcement are likely to occur in the coming years.

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210. See La. R.S. 49:964(G) (1987).

211. La. R.S. 30:2050.21(C) (Supp. 1997).

212. La. R.S. 49:992(B)(2) (Supp. 1997).

Although the Environmental Quality Act grants the public substantial opportunities to participate in rulemaking procedures and the chapter on administrative enforcement expands the rights of members of the public to participate in formal enforcement proceedings, the obstacles to new rules and the secretary's diminished powers of enforcement are likely to encourage a cooperative regulatory atmosphere that will substantially reduce public scrutiny of the regulatory process. Moreover, the new requirements for issuing rules, the expanded protections for respondents in administrative enforcement proceedings, and the additional layer of judicial review will at least delay rules and sanctions in cases where the department ultimately achieves its objectives. Likewise, the transfer of the final administrative decision in cases of adjudications from the secretary to the administrative law judge and the right of an applicant to file an action for declaratory judgment when the secretary declines to issue a declaratory ruling have the potential to restrict substantially the secretary's control of the regulatory and enforcement agenda. Finally, the ambiguity regarding the new risk-assessment requirement, the precise scope of the authority of the administrative law judge, the continuing validity of the adjudicatory hearing provisions of the new chapter of the Environmental Quality Act on administrative enforcement, and the new declaratory ruling section give lawyers who represent the regulatory community a plethora of new legal issues that the courts will not definitively resolve for years to come.

Of course, a perspective biased toward effective protection of the environment would produce a somewhat different appraisal of the new procedures. The vision of an observer with that perspective would be to create an environmental agency that was firm, but fair, in regulating those who pollute the environment and in enforcing the regulations against violators. The essential condition for establishing such an agency would be adequate funding, but one could also identify other criteria for evaluation.

An agency committed to firm, but fair protection of the environment should maximize the use of legislative rules to establish its policies. Using rules both insures wide applicability of the policies and provides notice of what is expected to those affected by them.

The agency should also approach environmental problems aggressively and evenhandedly. It should address environmental concerns promptly and should remain responsible and accountable for its decisions. Of course, the agency should base its decisions (especially on permit applications and in enforcement actions) on nonpartisan considerations.

Strict, consistent, and uniform enforcement is yet another element of effective environmental protection. To avoid granting a perverse incentive to polluters, the agency should have broad administrative authority to mandate the elimination of violations and to impose substantial monetary penalties against violators. For more serious actions, the agency should have a judicial venue for imposing sanctions. Finally, the agency should have expedited procedures for responding to minor violations.

Judicial review is also an essential component of any fair system of environmental regulation. Individuals affected by environmental regulatory decisions should have the opportunity to obtain an independent review of the administrative decision. The system should, however, provide for prompt resolution of judicial disputes. Moreover, to preserve agency accountability, courts should limit their review of agency decisions to the administrative record.

One who views Louisiana's recent reforms by the standards of the preceding paragraphs can find far less to praise in them than apologists for the regulated community. The new procedures are likely to discourage rules and enforcement actions and to delay both when the department does act. In addition, the amended procedural requirements lengthen the process of judicial review beyond what is needed to protect the legitimate interests of the regulated community and the public.

The recent restrictions on the imposition of new and increased fees constitute a major setback for regulatory efforts to protect the environment. Effective regulation and enforcement cost money, and the new limits make it unlikely that new funds for environmental protection will be forthcoming for the foreseeable future. Moreover, a very practical reason exists for preferring fees to taxes for funding environmental regulatory activities. Fees imposed on those that pollute the environment force those activities to internalize some of the environmental costs they impose on the community as a whole. Where alternatives to pollution exist, a fee system encourages polluters to eliminate pollution when elimination is efficient.

The new rulemaking procedures are also likely to make new regulatory initiatives difficult, if not impossible; when policy changes do occur, they are likely to proceed by informal agreements between the regulators and polluters rather than by a public decision-making process. Particularly objectionable is the requirement for a formal risk-assessment analysis for new rules.<sup>213</sup> Its practical impact will be to deter new rules until after harm has been documented because it has already occurred. Also lamentable is the discriminatory nature of some of the new procedures. Even though they amend the Administrative Procedure Act rather than the Environmental Quality Act, some of the most onerous of the new requirements apply only to rules issued by the Department of Environmental Quality.<sup>214</sup>

The statute creating an administrative division in the Department of State Civil Service is likely to have an adverse impact on the permitting and enforcement functions of the Department of Environmental Quality. The creation of an independent division with supervisory authority over all administrative law judges is theoretically desirable,<sup>215</sup> but its practical impact will be slight. However, the adverse impact of allowing the administrative law judge to make

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213. La. R.S. 49:953(G) (Supp. 1997). *See supra* notes 34-38 and accompanying text.

214. *See* La. R.S. 49:953(F)(3), (G) (Supp. 1997).

215. La. R.S. 49:994, 996-97 (Supp. 1997). *See supra* notes 62-63 and accompanying text.

the final administrative decision is likely to be considerable.<sup>216</sup> It will reduce the department's accountability for the consequences of its decisions. For permitting decisions, it will strengthen the applicant's hand in negotiating permit conditions and will discourage public input. When violations occur, the transfer of final administrative authority will discourage the agency from using formal means of administrative enforcement. Here also, public participation is likely to be diminished, and the negotiating position of the polluter is likely to be strengthened.

The changes relating to administrative enforcement present more of a mixed bag. In some respects, the provisions of the new Environmental Quality Act chapter are consistent with firm, but fair enforcement of the Act against violators. The chapter mandates use of rules to establish departmental policies.<sup>217</sup> It also establishes a uniform process that weighs the interests of the respondent, the public, and the department. On the other hand, the secretary's authority to compromise compliance orders was needlessly expanded.<sup>218</sup> Further, the provision for informal proceedings was rendered impotent by requiring the consent of the respondent to use them.<sup>219</sup>

Unfortunately, granting the administrative law judge the authority to make the final administrative decision in adjudications<sup>220</sup> subverts much of the desirable reform of the new enforcement chapter of the Environmental Quality Act. Most importantly, it diminishes the secretary's responsibility for effective enforcement of the environmental statutes and rules. In addition, it renders unworkable the new statutory process for handling administrative enforcement actions.

Although the judicial review provisions have generated considerable public controversy, the impact of the 1995 and 1996 statutes<sup>221</sup> relating to judicial review is likely to be modest. Adding a new layer of judicial review in the district court seems wasteful, but the substantive basis for review remains the administrative record.<sup>222</sup> Moreover, with fewer rules and enforcement actions, the number of judicial appeals will also probably fall.

The uncoordinated nature of the recent changes adds a number of technical concerns regarding the new statutes. The Environmental Quality Act chapter on administrative enforcement is the remnant of a law institute process that involved representatives of the secretary, the regulated community, and environmental groups. However, the legislature enacted the other statutes without significant public debate. One consequence is significant ambiguity regarding the new

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216. La. R.S. 49:992(B)(2) (Supp. 1997). *See supra* note 64 and accompanying text.

217. La. R.S. 30:2050.1(A), .3(A) (Supp. 1997). *See supra* notes 93-94 and accompanying text.

218. La. R.S. 30:2050.7(A) (Supp. 1997). *See supra* note 120 and accompanying text.

219. La. R.S. 30:2050.6(A) (Supp. 1997). *See supra* note 119 and accompanying text.

220. La. R.S. 49:992(B)(2) (Supp. 1997).

221. 1996 La. Acts No. 41, § 1 (Extraordinary Session); 1995 La. Acts No. 1208, § 1. *See supra* notes 129-133 and accompanying text.

222. La. R.S. 30:2050.21(C) (Supp. 1997). *See supra* notes 134-138 and accompanying text.

provisions. The doubtful issues include the scope of the constitutional limitation on fees,<sup>223</sup> the individual responsible for the final administrative decision for federal programs administered by the Department of Environmental Quality,<sup>224</sup> the potential inconsistencies between the amendments regarding adjudicatory hearings,<sup>225</sup> the availability of declaratory relief following an administrative refusal to grant a declaratory ruling,<sup>226</sup> and the possibility that the district court may apply a stricter scrutiny than the court of appeals in reviewing administrative decisions.<sup>227</sup> Representatives of the regulated community can rejoice in the new issues that have been handed to them. Environmentalists can only lament the new uncertainty that has been introduced into the state's fulfillment of its constitutional duty to protect the environment.

From the perspective of one who hopes to protect the environment, the losses of the new statutes far outweigh the small improvement in enforcement procedures. Indeed, the recent Louisiana reforms seem to provide an example on the state level of a recent phenomenon that has recently been documented on the federal level: using the mantle of administrative reform to disguise a substantive goal of reduced protection for the environment.<sup>228</sup>

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223. La. Const. art. VII, § 2.1.

224. See *supra* notes 173-175 and accompanying text.

225. See *supra* notes 75-85 and accompanying text.

226. La. R.S. 30:2050.10(C) (Supp. 1997). See *supra* notes 203-205 and accompanying text.

227. See *supra* text following note 212.

228. See Robert L. Glicksman and Stephen B. Chapman, *Regulatory Reform and (Breach of) The Contract With America*, 5 Kan. J.L. & Pub. Pol'y 9 (1996).